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Statutory Time Limitations on the Availability of Judicial Review of Regulations Under SMCRA

Jack C. Bender
University of Kentucky

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INTRODUCTION

Statutory time limitations on the availability of judicial review of agency action have recently become popular with Congress. This is particularly true in the area of environmental regulation.[1] Time restrictions on judicial review offer significant benefits to agencies in the administration of national regulatory programs;[2] however, carte blanche use of these short-fused statutes of limitations to bar all late challenges to a rulemaking raises serious constitutional concerns. Congress can limit or preclude judicial review of many rulemaking issues,[3] but due process and separation of powers principles should prevent Congress from removing all questions of law from the courts concerning an agency rulemaking.[4] That courts have recognized these concerns is evidenced by their frequent narrow interpretations of statutory review restrictions to avoid potential constitutional conflicts.[5]

The Surface Mining Control and Reclamation Act of 1977[6] contains a time restriction on judicial review[7] that has been

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[1] *See, e.g.*, Federal Water Pollution Control Act § 509 (b)(1) & (2), 33 U.S.C. § 1369(b)(1) & (2) (1982) (90 days); Clean Air Act § 307(b)(1) & (2), 42 U.S.C. § 7607(b)(1) & (2) (1982) (60 days); Noise Control Act § 16(a), 42 U.S.C. § 4915(a) (1983) (90 days); Surface Mining Control and Reclamation Act of 1977 § 526(a)(1), 30 U.S.C. § 1276(a)(1) (1982) (60 days).

[2] *See infra* notes 18-23 and accompanying text.

[3] Administrative Procedure Act, 5 U.S.C. § 701(a)(1) (1982) [hereinafter APA]; *see also* Yakus v. United States, 321 U.S. 414 (1944) (challenge of regulation barred by running of sixty-day review period); Sheldon v. Sill, 12 L. Ed. (1 How.) 1147, 1151 (1850); Lockerty v. Phillips, 319 U.S. 182 (1943); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

[4] *See infra* Parts IV & V.

[5] *See infra* Part III.

[6] Surface Mining Control & Reclamation Act of 1977, Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1982)) [hereinafter SMCRA].

[7] SMCRA § 526(a)(1), 30 U.S.C. § 1276(a)(1) (1982) (sixty days).

successfully used by the Office of Surface Mining[8] to preclude many late challenges to its regulations.[9] Section 526(a)(1) of SMCRA provides that national rules or regulations which are promulgated by the Secretary "shall be subject to judicial review. . . ."[10] The petition for review, however, must "be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day."[11]

The sixty-day restriction on judicial review of rulemakings under SMCRA is typical of the review limitations that exist in other environmental statutes.[12] The preclusive reach of Section 526(a)(1), however, has yet to be fully delineated by the courts.

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[8] The "Office of Surface Mining Reclamation and Enforcement" [hereinafter OSM] is the agency responsible for implementing and enforcing SMCRA. *See* SMCRA § 201, 30 U.S.C. § 1211 (1982).

[9] *See, e.g.*, Utah Int'l, Inc. v. Department of Interior of the United States, 553 F. Supp. 872, 878 (D. Utah 1982); *In re* Surface Mining Regulation Litig. 456 F. Supp. 1301, 1307 (D.D.C. 1978); *In re* Permanent Surface Mining Regulation Litig. (II), 100 F.R.D. 710, 712 (D.D.C. 1983); *cf.* Clinchfield Coal Co. v. Hodel, No. 85-2206 (4th Cir. 1986); Drummond Coal Co. v. Watt, 735 F.2d 469, 472-76 (11th Cir. 1984). *But cf.* Holmes Limestone Co. v. Andrus, 655 F.2d 732, 738 (6th Cir. 1981), *cert. denied*, 456 U.S. 995 (1982).

[10] SMCRA § 526(a)(1), 30 U.S.C. § 1276(a)(1) (1982).

[11] Section 526(a)(1) provides:

> (1) Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to this chapter shall be subject to judicial review by the United States District Court for the District which includes the capital of the State whose program is at issue. Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 1251, 1265, 1266, and 1273 of this title shall be subject to judicial review in the United States District Court for the District of Columbia Circuit [sic]. Any other action constituting rulemaking by the Secretary shall be subject to judicial review only by the United States District Court for the District in which the surface coal mining operation is located. Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

30 U.S.C. § 1276(a)(1) (1982).

[12] *See supra* note 1.

If Section 526(a)(1) is interpreted to cut off even constitutionally based challenges after the sixty-day period has run, then due process and separation of powers concerns are at their greatest.[13] The availability of full judicial review for sixty days goes a long way in protecting a party's due process rights. In some extenuating circumstances, however, due process may mandate that court review be available after the sixty-day period has expired.[14] By attempting to remove constitutional and jurisdictional-based claims from the courts after only sixty days, Congress is interfering with an inherent judicial function.[15] Removal of these essential questions of law from Article III courts conflicts with separation of powers as mandated by the Constitution.

This Note examines the scope of the sixty-day limit on judicial review under Section 526(a)(1) of SMCRA and the due process and separation of powers concerns that may arise in its application. Initially, this Note presents the practical implications for OSM and industry of a strict application of the sixty-day limitation and discusses the role of courts when the time bar is raised as a defense to an attack on a regulation's validity. The remainder of the Note analyzes three key questions concerning the sixty-day restriction on judicial review: (1) what is the intended scope of the time limitation; (2) under what circumstances might due process be violated by application of the time bar; and (3) would a broad interpretation of Section 526(a)(1) render the section in conflict with separation of powers principles.

I. APPLICATION OF THE SIXTY-DAY REVIEW RESTRICTION

The effect of the time limitation in Section 526(a)(1) is to bar a challenge of a regulation that is not initiated within sixty days of publication of the final rule[16] in the Federal Register.[17] Application of the sixty-day cut-off advances several national

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[13] *See infra* notes 176-85, 216-27 and accompanying text.

[14] *See infra* notes 176-78 and accompanying text.

[15] *See infra* notes 241-51 and accompanying text.

[16] *See* cases cited *supra* note 9.

[17] The Notice and Comment rulemaking procedures of the APA must be followed by the Secretary in promulgating regulations. The APA also mandates that general notice of proposed and final rules be published in the Federal Register. 5 U.S.C. § 553(b), (d) (1982).

interests, yet can seem unfair to individual challengers and industry as a whole. The role of the courts in this situation is to determine whether the sixty-day bar reaches to the challenge at hand, and if so, whether its application would be repugnant to a petitioner's constitutional rights.

A. Practical Implications

The sixty-day time limitation promotes judicial economy by insuring that all attacks are brought expeditiously and that similar actions are consolidated in a single suit.[18] The time limit also has the advantage of quickly establishing the enforceability of national standards and guidelines.[19] When the sixty-day challenge period has passed, OSM can begin to enforce the new standards without concern that the regulation might be overturned in a subsequent challenge. The sixty-day review period also encourages interested parties[20] to participate[21] in the rulemaking process so that they are in a position[22] to raise any legitimate concerns in a judicial action.[23]

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[18] Section 526(a)(1) of SMCRA also requires all challenges of "national rules or regulations" to be brought in the United States District Court for the District of Columbia. 30 U.S.C. § 1276(a)(1) (1982). The scope of the venue provisions in Section 526(a)(1) are not addressed in this paper. *Compare* Commonwealth of Virginia v. Watt, 741 F.2d 37 (4th Cir. 1984) *with* Holmes Limestone Co. v. Andrus, 655 F.2d 731 (6th Cir. 1981) *cert. denied*, 456 U.S. 955 (1982).

[19] *See* SMCRA § 102, 30 U.S.C. § 1201 (1982); *Drummond Coal Co.*, 735 F.2d at 474-75; *see also* Chrysler Corp. v. Environmental Protection Agency, 600 F.2d 904, 912 (D.C. Cir. 1979) (discussing time restrictions on review under Noise Control Act). *See generally* Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 742 (1983).

[20] Typically, parties that would be interested in challenging a rulemaking under SMCRA include mining companies, landholding companies, individuals who own property near coal mining areas, environmental groups, and state regulatory agencies. Interview with Marcus McGraw, Attorney with Greenebaum, Doll & McDonald, in Lexington, Kentucky (Feb. 15, 1987) [hereinafter cited as McGraw Interview].

[21] 5 U.S.C. § 553(c) (1982) provides that interested persons shall have "an opportunity to participate in the rule making through submission of written data, views, or arguments. . . ." *Id.*

[22] The standing provision of Section 526(a)(1) could be read to limit the right to file a petition *only* to persons who actually participated in rulemaking. *See infra* note 26 and accompanying text.

[23] If the validity of a regulation could be challenged at any time, an interested party would not have much incentive to participate in the rulemaking when the proposed

Despite the administrative benefits of review restrictions, strict application of the cut-off seems unjust to petitioners with legitimate claims who either could not challenge or had no motivation to challenge the regulation during the sixty-day period. The coal mining industry is dynamic.[24] A company that is not in the mining business during the review period would not likely be motivated to challenge a regulation (even if it was aware of the rule's promulgation).[25] Perhaps more significantly, the company may not have been threatened with sufficient impact by the rule to have standing to bring a challenge.[26] Thus,

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regulation would not have an immediate direct impact on its business concerns. Yet, the technical and business experience of the party might be valuable to the integrity of the rulemaking decision. An express purpose of Congress is to "assure . . . public participation in the development, revision, and enforcement of regulations [and] standards. . . ." SMCRA § 102(i), 30 U.S.C. § 1202(i) (1982). The sixty-day limitation on challenges encourages participation by parties that could be affected by the proposed regulation.

[24] *Both large and small mining companies are frequently sold outright. In some* instances, the purchaser is a corporation that has no other mining interests. Also, small operators may still enter the industry at any time, although in recent years they seem to be a *disappearing* breed. *See* McGraw Interview, *supra* note 20.

[25] Under the statutory scheme of SMCRA the petitioner's interest may be aesthetic or economic. An entity that is not in the mining business, has no property interests in mining areas, and is not active in environmental issues will likely have no motivation for challenging a regulation.

[26] The first prerequisite to standing is that the party must have suffered or be threatened with some specific tangible injury under operation of the regulation. Sierra *Club v. Morton*, 405 U.S. 727, 734-35 (1972). *The injury in fact requirement of standing* is that "the party seeking review be himself among the injured." *See* Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 152 (1970) (The challenged agency action must have caused the plaintiff "injury in fact" so that the adjudication is presented in an adversarial context.). Secondly, the interest sought to be protected must be arguably within the zone of interests protected or regulated by the organic statute. *Data Processing Serv.*, 397 U.S. at 153. SMCRA was passed with the purposes of protecting "society and the environment from the adverse effects of surface coal mining" as well as assuring that coal supplies essential to the nation are maintained. SMCRA § 102, 30 U.S.C. § 1201 (1982). SMCRA's statutory scheme extends to aesthetic, environmental, and economic interests that can be impacted by mining. These interests are sufficient to meet the zone of interests prong of the standing test. *Data Processing Serv.*, 397 U.S. at 154. However, as *Sierra Club* establishes, a cognizable interest alone is insufficient to impart standing unless injury in fact also exists. *Sierra Club*, 405 U.S. at 734-35. In addition, Section 526(a)(1) may also further restrict the availability of judicial review through *its* "standing provision." "Any such petition may be made by any person who participated in the administrative proceedings *and* who is aggrieved by the action of the Secretary." 30 U.S.C. § 1276(a)(1) (1982) (emphasis added); *see supra* note 11 for full text of section 526(a)(1). Although it is beyond the scope of this Note,

such a company may never have had an opportunity to challenge a regulation even if it so desired during the review period.

More typically, a petitioner may not have any motivation to challenge a rulemaking during the review period. Court attacks on regulations are very costly.[27] Legal action may not be economically prudent even when valid grounds for a challenge exist if the party will not be immediately affected by the regulation[28] or if the impact of the rule is unknown.[29] For example, a coal company that only conducts "area mine"[30] operations in the Midwest would probably not challenge regulations that only affect "steep slope contour"[31] operations. If the company later acquires reserves in steep slope areas, Section 526(a)(1) will probably prevent it from challenging the regulations at that time.[32]

The sixty-day period provided in Section 526(a)(1) usually affords large coal operators and national environmental groups that keep abreast of developments in the Federal Register on a daily basis, a sufficient period of time in which to act. The judicial review period is harsh, however, when applied to private

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resolution of the standing issue under Section 526(a)(1) will have additional impact on the availability of judical review under the section. The effect of a restrictive interpretation of the standing provision will be that a potentially impacted party will not be able to challenge the regulation in court if it did not participate in the rulemaking (even within the sixty-day review period). This restrictive interpretation will make due process and separation of powers concerns even more compelling.

[27] McGraw Interview, *supra* note 20.

[28] *Id.*

[29] *In re* Surface Mining Regulation Litig., 456 F. Supp. at 1307 (sixty-day limit applies despite the "possibility of 'unpredictable applications' of the regulations in the future . . .").

[30] Area mining is a type of surface coal mining that is used in flat to very gently rolling topography. These conditions occur in the Midwestern and Western coal fields. Large draglines and shovels are often employed to uncover the coal reserves prior to reclamation of the area. A single mine can cover as much as 1000 acres. Interview with Larry Dusak, Assistant Manager, Skelly & Loy Consultants, in Lexington, Kentucky (Feb. 18, 1987) [hereinafter cited as Dusak Interview].

[31] Steep slope contour mining is practiced in the Appalachian coal fields where the coal outcrops on a hillside with a slope in excess of twenty degrees. This method of surface mining uses smaller and more mobile equipment than area mining and usually covers much less surface area. *Id. See generally* SMCRA § 515(d)(4), 30 U.S.C. § 1265(d)(4) (1982).

[32] SMCRA § 520(a)(1), 30 U.S.C. § 1276(a)(1) (1982). *See* cases cited *supra* note 9.

citizens and small operators. In a similar context, Justice Powell recognized that it "is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register."[33] Even a small operator which has notice of the regulation may not have the monetary resources to bring a pre-enforcement challenge. Nevertheless, that operator is barred from raising the validity of the regulation as a defense during a subsequent enforcement hearing.[34]

The barring of judical review may also be inequitable to industry or environmental interest groups as a whole when the rule slips past the sixty-day review period unchallenged. Although it seems unlikely that significant rulemakings would not be fully litigated by interested parties,[35] a regulation is not always tested on all grounds.[36] For example, 30 C.F.R. § 843.12(a)(2) is a jurisdictional regulation promulgated under SMCRA[37] that defines the circumstances under which OSM can issue notices of violations (NOV's)[38] in states that have primacy over their surface mining program.[39] The validity of Section 843.12(a)(2) has

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[33] Adamo Wrecking Co. v. United States, 434 U.S. 275, 290 (1978) (Powell, J., concurring) (discussing the thirty-day limitation on judicial review imposed by the Clean Air Act).

[34] *See* cases cited *supra* note 9; *see also* Yakus v. United States, 321 U.S. 414 (1944) (challenge of regulation under Emergency Price Control Act barred by 60-day period).

[35] *See* Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 757 n.93 (1983). Professor Verkuil argues that in environmental rulemakings it is rare that a regulation will get by the judicial review period without being fully tested by parties on both sides of the issue. Therefore, it is unlikely that the current challenger could raise arguments that have not already been presented in one form or another. *Id.*

[36] This occurrence may be more likely when the manner or impact of the rule's application cannot be readily foreseen. *See supra* note 29.

[37] Promulgated in final form at 47 Fed. Reg. 35,638 (1982). OSM has published a proposed rule that would establish a standard for determining when a state regulatory authority has taken "appropriate action" in response to notification of a possible violation. 52 FED. REG. 34,050 (1987).

[38] Section 843.12(a)(2) essentially provides that OSM shall issue a notice of violation when a violation of the Act or a permit condition is discovered during a federal inspection in a state with enforcement primacy if the state fails to take appropriate action within ten days after receiving written notice of the violation from the federal inspector. 30 C.F.R. § 843.12(a)(2) (1982).

[39] Under SMCRA, a state can assume exclusive jurisdiction over surface coal mine

been raised as a defense in enforcement proceedings on several occasions, but the claims have been barred by the jurisdictional limitations of Section 526(a)(1).[40] Because of the nondiscretionary nature of this type of regulation,[41] it seems repugnant to constitutional principles to bar a court (especially one with enforcement jurisdiction) from considering an ultra vires challenge to the regulation's validity.[42] The result is to render unreviewable

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regulation and enforcement if it is demonstrated that the state has the capacity to meet the provisions and purposes of the Act. SMCRA § 503(a), 30 U.S.C. § 1253(a) (1982).

[40] *See, e.g.*, Clinchfield Coal Co. v. Department of the Interior of the United States, 640 F. Supp. 334 (W.D. Va. 1985), *rev'd*, 802 F.2d 102 (4th Cir. 1986); Drummond Coal Co., Inc. v. Hodel, Civ. No. 85-AR-1411-S (N.D. Ala. June 6, 1985). Several federal district courts have concluded that 30 C.F.R. § 843.12(a)(2) provides for enforcement power in excess of that authorized by Congress in SMCRA. *See Clinchfield Coal Co.*, 640 F. Supp. 334, 341 (W.D. Va. 1985) (the "regulation goes beyond the scope of authority granted to OSM under the Act, and is in direct conflict with intent of Congress . . . "), *rev'd on other grounds*, 802 F.2d 102 (4th Cir. 1986) (dismissed based on lack of jurisdiction under SMCRA § 526(a)(1)); *Drummond Coal*, Civ. No. 85-AR-1411-S (N.D. Ala. June 5, 1985); Excello Coal Corp. v. Clark, Civ. No. 3-84-904 (E.D. Tn. Dec. 27, 1984); *see also In re* Permanent Surface Mining Regulation Litig. (II), 653 F.2d 514, 518-19 (D.C. Cir. 1981) (discussing the role of OSM in primacy states as being primarily one of oversight and not direct involvement); Rulemaking Petition submitted by the Mining and Reclamation Council of America, 51 FED. REG 27,197 (1986) (seeking repeal of 30 C.F.R. § 843.12(a)(2)) (repeal request denied on June 8, 1987 (52 FED. REG. 21,598 (1987))).

[41] Social Sec. Bd. v. Nierotko, 327 U.S. 358, 369 (1946) (an agency may not decide with finality the limits of its own statutory power); Harmon v. Brucker, 355 U.S. 579, 582 (1958) (agency actions in excess of delegated powers do not "constitute exercises of . . . [its] administrative discretion . . . "); Addison v. Holly Hill Fruit Prods. Inc., 322 U.S. 607, 616 (1944) ("The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."). In *Clinchfield Coal Co.*, 640 F. Supp. 334, the district court observed that:

> The Secretary's regulation at 30 C.F.R. § 843.12(a)(2) is not a substantive regulation setting out requirements for mining operations. Rather, it is the purported authority under which the Secretary has taken enforcement action against Clinchfield Coal. If the Surface Mining Act has not provided the Secretary with such authority, then his enforcement action cannot stand.

Id. at 345 (decision on Motion for Reconsideration).

[42] As Professor Berger has emphasized:

> It is the function of the courts to insure that administrators do not act in excess of jurisdiction. Implicit in the delegation, therefore, is the corollary that courts must confine the administrator within the ambit of the conferred jurisdiction at the call of one injured lest the delegated restrictions be set at naught.

Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 89 (1965). Concerning a total preclusion of judicial review of agency actions, the court in

a potential usurpation by an agency that went unnoticed through the limited review period.

B. The Court's Role

Judicial inquiry is always available in some federal forum to determine whether an act of Congress is consistent with constitutional law.[43] A statutory provision such as Section 526(a)(1) cannot be used to totally cut off review of whether the section is being applied in a constitutional manner.[44] Separation of powers principles mandate that the Court, and not Congress, determine the extent to which judicial review of regulations can constitutionally be restricted by statute.[45] A party which is precluded from challenging the validity of a regulation by Section 526(a)(1) should have the opportunity on appeal of the district court's ruling to show that application of the time restriction is repugnant to its constitutional rights. Any claimant threatened by the sixty-day limitation can also establish that the scope of the preclusive statute does not extend to the circumstances of the challenge at hand.[46]

Constitutional concerns also arise when the party seeking to attack the validity of a regulation does so as the defendant in an enforcement proceeding.[47] In this scenario, the sixty-day lim-

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Fleming v. Moberly Milk Prods. Co., 160 F.2d 259 (D.C. Cir. 1947), *cert. denied*, 331 U.S. 786 (1947), stated that "[i]f the judiciary had no power in such matter, the only practical restraint would be self-restraint of the executive branch. . . . [S]uch a result is foreign to the concept of the division of powers of government." *Id.* at 265. Without court review of the limits of agency action, "the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual." American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110 (1902).

[43] Johnson v. Robinson, 415 U.S. 361, 366 n.7 (1974); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[44] The courts must have the final say in the matter, not Congress. *Marbury*, 5 U.S. at 177.

[45] *See* cases cited *supra* note 44. *Cf.* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality decision).

[46] Harmon v. Brucker, 355 U.S. 579, 582 (1958) (A court has "jurisdiction to determine its jurisdiction.").

[47] *See* Yakus v. United States, 321 U.S. 414, 467-68 (1944) (P. Rutledge, J., dissenting). *See generally* BATOR, MISHKIN, SHAPIRO, & WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 330-75 (2d ed. 1973) [hereinafter BATOR].

itation does not act to bar the Article III court of all jurisdiction because the court has jurisdiction to enforce the Secretary's order of a civil penalty.[48] Article III empowers Congress to remove jurisdiction from a lower federal court,[49] but separation of powers principles may not allow Congress to bar a court from considering certain matters while otherwise deciding a case.[50] Effectively, Congress has done just that with SMCRA; district courts are barred from considering any claims concerning the validity of the underlying regulation while deciding whether to enforce a penalty or other sanction.[51]

II. SCOPE OF PRECLUSION UNDER SECTION 526(A)(1)

Congress' intent to restrict judicial review of some agency rulemakings is clear in Section 526(a)(1). What is not so clear is the specific types of rules[52] and challenges[53] that are encompassed

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[48] Under Section 526(a)(1) of SMCRA, orders issued by the Secretary in a civil penalty or other formal adjudication are subject to judicial review in district court. 30 U.S.C. § 1276(a)(2) (1982). The defendant in such a proceeding is still precluded from raising the validity of a regulation as a defense if the sixty-day review period has expired. SMCRA § 526(a)(1), 30 U.S.C. § 1276(a)(1) (1982).

[49] *See supra* note 3 and accompanying text.

[50] *See infra* notes 241-251 and accompanying text. *See generally* BATOR, *supra* note 47, at 336-41.

[51] *See* SMCRA §§ 526(a)(1), (2), 30 U.S.C. §§ 1276(a)(1), (2) (1982).

[52] The APA defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 551(4) (1982). Substantive rules can be characterized as legislative or interpretive. Professor Davis describes the distinction as follows. "A legislative rule is the product of an exercise of delegated legislative power to make law through rules. An interpretive rule is any rule any agency issues without exercising delegated legislative power to make law through rules." 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.8, at 36 (1979). The distinction is important because legislative rules, such as performance standards, are given more deference by courts during review than are interpretive rules. *Id.* Interpretive rules are not binding on courts. *Id.* at 36, 59. An agency regulation that further defines the limits of the agency's own statutory authority is treated as an interpretive rule. *See supra* note 41. 30 C.F.R. § 843.12(a)(2) clearly falls into this category. *See supra* notes 38-40.

[53] Under APA § 706(2), a reviewing court can invalidate a rule promulgated through the informal notice and comment process if it is found to be:

> A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> B) contrary to constitutional right, power, privilege, or immunity;
>
> C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> D) without observance of procedure required by law [§ 553].

5 U.S.C. § 706(2)(A)-(D) (1982).

by the sixty-day preclusion.[54] Ascertaining the intended scope of the section is critical because it bears directly on the section's constitutionality. The scope of the review restriction must be determined from the plain language of the statute, the section's role within SMCRA's statutory design, the legislative history of the section, and case law interpreting analogous statutory provisions.[55]

Several basic tenents of statutory interpretation have evolved for construing statutory language that attempts to limit judicial review.[56] Regulations are presumed to be reviewable, and courts interpret statutory review restrictions narrowly.[57] Access to judicial review will be restricted "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent."[58] If the statutory scheme is silent as to the availability of review of a certain type of final agency action, the action is generally deemed reviewable.[59] Courts are most apt to interpret review

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[54] *Compare* Clinchfield Coal Co. v. Department of Interior of the United States, 640 F. Supp. 334, 338 (W.D. Va. 1985) (attack on statutory authority of enforcement regulation not barred by Section 526(a)(1)) *with* Drummond Coal Co. v. Watt, 735 F.2d 469, 473 n.5 (11th Cir. 1984) (all regulations with national impact are subject to the jurisdictional restrictions in § 526(a)(1)) *and* Holmes Limestone Co. v. Andrus, 655 F.2d 732, 738 (6th Cir. 1981) (no "clear and convincing evidence" exists to support a broad scope of exclusion under the sixty-day limitation).

[55] Southern R.R. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 462 (1979) (finding "clear and convincing evidence" of congressional intent to preclude all judicial review of the ICC's decision not to investigate rate increases under Section 15(8) of the Interstate Commerce Act).

[56] *See generally*, BREYER & STEWART, ADMINISTRATIVE LAW & REGULATORY POLICY, 1055-57 (2d ed. 1985).

[57] Rusk v. Cort, 369 U.S. 367, 379-80 (1962) ("The broadly remedial provisions of the [APA] will not be precluded in the absence of clear and convincing evidence of congressional intent.") Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967); Barlow v. Collins, 397 U.S. 159, 166-67 (1970).

[58] *Abbott Laboratories*, 387 U.S. at 141. *But see* Block v. Community Nutrition Inst., 467 U.S. 340, 354 (1984) (Clear and convincing in this context is met, and the presumption favoring review overcome, when the intent to preclude is "fairly discernable in the statutory scheme.").

[59] San Juan Legal Servs., Inc. v. Legal Servs. Corp., 655 F.2d 434, 438 (1st Cir. 1981) (finding that the silence in the statute and legislative history on the issue of judicial review does not indicate intent to preclude review) (citing Stark v. Wickard, 321 U.S. 288, 309-10 (1944)); Commonwealth of Virginia v. Marshall, 599 F.2d 588, 592 (4th Cir. 1979) (preclusion of review will not be implied from statutory silence); *see also* Consumer Fed'n of America v. Federal Trade Comm'n., 515 F.2d 367, 370 (D.C. Cir. 1975) (holding that clear and convincing evidence of intent to preclude review can be provided by the legislative history when the statute is silent as to review).

restrictions narrowly when serious questions concerning the constitutionality of the provision would otherwise be at issue.[60] In sum, judicial review of agency actions is favored at law and will only be restricted by the clearest intentions of Congress, and sometimes not even then.[61]

The sixty-day limitation on review in Section 526(a)(1) of SMCRA applies to "any action subject to judicial review under this subsection. . . ."[62] The section refers to three categories of actions as being subject to judicial review:

> [1] Any action by the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program . . .
> [2] any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 501, 515, 516, and 523 . . .
> [3] any other action constituting rulemaking by the Secretary. . . .[63]

On its face, Section 526(a)(1) does not clearly specify the types of regulations or challenges to which the sixty-day limit applies.[64] Rather, the section characterizes actions for venue

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[60] Johnson v. Robinson, 415 U.S. 361, 366-67 (1974) (quoting United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971)) ("[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional questions may be avoided.") (construing the statute to allow for judicial review of constitutional issues); *see also* Califano v. Sanders, 430 U.S. 99, 109 (1977).

[61] Harmon v. Brucker, 355 U.S. 579, 581-83 (1958) (Even though the statute clearly precluded judicial review of the Secretary of Army's findings related to discharge, the Court construed the statute to allow for review of whether the Secretary acted within its jurisdiction.). For a critical analysis of a broad presumption of judicial review, see Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 773 n.155 (1983).

[62] SMCRA § 526(a)(1), 30 U.S.C. § 1276(a)(1) (1982).

[63] *Id.* Section 501 of SMCRA requires the Secretary to issue regulations covering mining and reclamation performance standards. 30 U.S.C. § 1251 (1982). Section 515 specifies the minimum requirements for general performance standards. 30 U.S.C. § 1265(b) (1982). Section 516 relates to special performance standards for underground mining operations. 30 U.S.C. § 1266 (1982). And finally, Section 523 provides for regulations pursuant to a Federal Lands Program. 30 U.S.C. § 1273 (1982).

[64] The first category of actions which applies to approval or disapproval of a state's program does not include the types of national regulations with which this Note is concerned. Therefore, the second and third categories of actions are examined in light of the other modifying language in Section 526(a)(1) to ascertain the types of regulations and challenges that are within the preclusive scope.

purposes.[65] The second category of actions in Section 526(a)(1) encompasses the promulgation of national guidelines and performance standards which establish the criteria for mining and reclamation operations.[66] OSM is granted much discretion in making substantive regulations of this type,[67] but the reference to specific types of national performance standards leaves some doubt that this category includes interpretive enforcement regulations.[68] The section's legislative history, however, indicates that *all types* of regulations with national impact are included in the restriction and specific reference to standards in Sections 501, 515, 516, and 523 is superfluous emphasis of the primary performance standard regulations.[69] The legislative history is by no means clear on this issue as this interpretation is based on a relatively minor unexplained change of the section by the Conference Committee.[70]

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[65] *See* H. R. REP. No. 493, 95th Cong., 1st Sess. 111 (1977); S. REP. No. 337, 95th Cong., 1st Sess. 111 (1977). For full text of the section see *supra* note 11.

[66] In his dissent in *Holmes Limestone Co.*, 456 U.S. 995 (1982) (denying certiorari), Justice White recognized that Section 526(a)(1) "provides that *regulations with national impact* be reviewed in the District of Columbia, those with a statewide impact in the district court for the district of the capital of the state involved, and all other regulations only in the district where the surface mining operation at issue is located."
Id. at 996 (White, J., dissenting from denial of certiorari) (emphasis added).

[67] *In re* Surface Mining Regulation Litig., 456 F. Supp. 1301, 1308-09 (D.D.C. 1978) (Secretary has broad discretion in using either design criteria or performance standards to achieve the purposes of the Act). Section 526(a)(1) specifies that review shall be based on an arbitrary and capricious standard, nearly as deferential a review as is ever afforded. 30 U.S.C. § 1276(a)(1) (1982).

[68] In fact, Sections 517(h)(2) and 502(e) which provide for inspection regulations and a federal enforcement program are not referenced in Section 526(a)(1). However, reference to Sections 501, 515, 516 and 523 within Section 526(a)(1) does not appear to be exclusive, but only for special emphasis. 30 U.S.C. §§ 1252(e), 1267(h)(2) (1986).

[69] An earlier version of H.R. 2 specified that "any action by the Secretary promulgating standards pursuant to sections 501, 515(e), 516, and 523 shall be subject to judicial review. . . ." H.R. REP. No. 218, 95th Cong., 1st Sess. 46 (1977); *see also* S. REP. No. 128, 95th Cong., 1st Sess. 41 (1977). The language was subsequently changed to: "promulgating *national rules or regulations including* standards pursuant to. . . ." 30 U.S.C. § 1276(a)(1) (emphasis added). *See* S. REP. No. 337, 95th Cong., 1st Sess. 75 (1977). Thus, the inserted language seems to broaden the scope of rulemaking review to include any type of rules that have national impact. The House Committee Report on H.R. 2 noted that "the Secretary's actions national in scope (such as promulgation of general regulations) will be subject to review. . . ." H.R. REP. No. 218, 95th Cong., 1st Sess. 70 (1977).

[70] *See supra* note 83; *see also Drummond Coal*, 735 F.2d at 474 ("Unexplained changes made in committee are not reliable indicators of congressional intent.").

The third category of actions subject to the sixty-day restriction could be viewed as a catchall provision which authorizes judicial review of *all* other types of rulemakings not encompassed by the first two categories. Such a reading of the provision, however, is strained. More likely, this category was intended as a venue provision relating to rulemakings aimed at individual surface mine operations.[71] This narrower reading of the third category is consistent with the venue policy of keeping review of regulations with national impact in the United States District Court for the District of Columbia.[72]

A reading of Section 526(a)(1) that excludes jurisdictional—based challenges from the scope of the subsection's venue provisions[73] is supported by the grounds specified for invalidating actions subject to judicial review under the subsection.[74] The "arbitrary, capricious, or otherwise inconsistent with law" standard is generally the key basis for testing the substance of discretionary rulemakings of performance standards.[75] Conversely, jurisdictional and enforcement regulations are commonly suspect under Section 706(2)(B) and (C) of the APA.[76] That Section 526(a)(1) refers only to the limited grounds of invalidation supports the contention that Congress intended Section 526(a)(1) to apply only to discretionary rulemakings of national

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[71] *See* H.R. No. 218, 95th Cong., 1st Sess. 177 (1977); *see also Holmes Limestone Co.*, 456 U.S. at 995 (White, J., dissenting from denial of certiorari) (noting that the third category establishes that regulations aimed at individual mines were reviewable "only in the district where the surface mining operation at issue is located").

[72] *See supra* note 66 and accompanying text.

[73] This proposition means that Congress was only referring to performance standards (i.e., legislative regulations) within the venue and time restrictions of the section.

[74] "Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law." SMCRA § 526(a)(1), 30 U.S.C. § 1276(a)(1) (1982).

[75] *See* Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983) (The arbitrary and capricious standard of review "is narrow, and a court is not to substitute its judgment for that of the agency."); *see also* Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (Arbitrary and capricious review requires the court to consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.").

[76] These subsections provide that agency actions must be set aside if found to be contrary to constitutional right or in excess of statutory authority. 5 U.S.C. §§ 706(2)(B), (C) (1982). *See also Harmon*, 355 U.S. at 581-82 (agency does not have discretion in defining limits of its statutory authority); cases cited *supra* note 41.

standards and not interpretive jurisdictional or enforcement regulations.[77] The limited grounds of invalidation may also imply that Congress did not intend to restrict judicial review when the challenge is based on constitutional or other grounds.[78] Congress knows how to exclude these fundamental types of claims in the statutory language when it so desires.[79]

Congress' primary concern in establishing the venue and time restrictions on review in Section 526(a)(1) was to promote definitive, uniform performance standards for regulating the mining industry.[80] Restricting the reviewability of jurisdictional regulations that define the contours of an agency's authority does not necessarily further these goals.[81] They are furthered, however,

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[77] S. REP. No. 128, 95th Cong., 1st Sess. 58 (1977) states:

> Because of the thoroughness and degree of due process afforded judicially reviewable actions by the Secretary, judicial review is to be based on the record made before the Secretary. The courts should render their decisions on the basis of whether or not the Secretary's decision was arbitrary and capricious or supported by the record.

Id. See supra note 79.

[78] Note that challenges based on these grounds are provided for in different subsections of APA section 706 from the subsection providing for arbitrary and capricious review. *Compare* 5 U.S.C. § 706(2)(A) (1982) *with* 5 U.S.C. § 706(2)(B), (C) (1982). *See supra* note 53.

[79] *See* Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652(d) (1982). Under this Act, Congress specifically required that "claims alleging that an action will deny rights under the Constitution of the United States, or that the action is beyond the scope of this chapter, may be brought within sixty days following the date of such action." *Id. See also* Verkuil, *supra* note 61 at 756.

[80] SMCRA § 102, 30 U.S.C. § 120 (1982). *See also Holmes Limestone Co.*, 456 U.S. at 997 (White, J., dissenting from denial of certiorari) (stating that Congress intended that there be uniform national performance standards); Commonwealth of Virginia ex rel. Virginia Dept. of Conservation and Economic Dev. v. Watt, 741 F.2d 37, 40-41 (4th Cir. 1984) (finding that Congress' intent was to foreclose the possibility of conflicting decisions on the validity of national mining regulations).

[81] The substance of national performance standards is not threatened by a challenge to a regulation delineating federal enforcement authority. *See* Chrysler Corp. v. Environmental Protection Agency, 600 F.2d 904, 912 (D.C. Cir. 1979). The legislative history of the Clear Air Amendments of 1970, 42 U.S.C. § 1857(h) (1976), is instructive as to Congress' intent in designing the jurisdictional restrictions in the various environmental statutes. *Chrysler Corp.*, 600 F.2d at 911. The *Chrysler Corp.* Court observed that the legislative objective of the review restrictions was to:

> limit judicial review as to forum and time so as to assure expeditious, authoritative and central judicial resolution of issues which were national

by cutting off all challenges to performance standards.[82]

Judicial interpretations of similar statutory provisions that seek to restrict the period of judicial review of agency actions, shied away from giving the provisions an all-inclusive reading.[83] In *State of Texas v. United States*,[84] the scope of a sixty-day restriction on review of agency orders under the Hobbs Act was considered by the Fifth Circuit Court of Appeals.[85] The court held that although the sixty-day limit barred the State of Texas from attacking the procedure under which the rules were promulgated, the Hobbs Act did not bar a challenge of the statutory authority for adopting the rule.[86] The same judicial approach has been taken by other courts to permit review of an agency's statutory authority for promulgating a particular rule despite the existence of a time restriction on challenges within the organic statute.[87] These cases illustrate that the *type of challenge* being made plays an important role in whether the restriction should apply.[88]

> in impact and which could hold up the timely accomplishment of the Act's objectives if not settled at the outset . . . . The purpose Congress declared is much more easily fitted to standards and testing than to an enforcement scheme. . . .

Id. at 911-12 (quoting in part from Brief for Respondents at 9-10).

[82] Allowing challenges to national performance standards on constitutional or ultra vires grounds will thwart these goals; if the challenge is successful, the regulation must be struck.

[83] *See* State of Texas v. United States, 749 F.2d 1144, 1146 (5th Cir. 1985), *cert. denied*, 472 U.S. 1032 (1985); Wayne State Univ. v. Cleland, 590 F.2d 627, 631-32 (6th Cir. 1978); Evergreen State College v. Cleland, 621 F.2d 1002, 1007-08 (9th Cir. 1980); *see also* Natural Resource Defense Council v. Nuclear Regulatory Comm'n., 666 F.2d 595, 602 (D.C. Cir. 1981); Functional Music, Inc. v. FCC, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

[84] 749 F.2d 1144.

[85] *Id.* at 1146. The Hobbs Act section at issue provided that a party aggrieved by a regulation or final order must petition for judicial view within sixty days. 28 U.S.C. §§ 2342, 2344 (1982).

[86] *State of Texas*, 749 F.2d at 1146 (citing *Nuclear Regulatory Comm'n.*, 666 F.2d at 602).

[87] *See* cases cited *supra* note 84; *Harmon*, 355 U.S. at 582 (Review restriction must be read to be harmonious with statutory authority "to the end that the basis on which the Secretary's action is reviewed is coterminous with the basis on which he is allowed to act."); *see also Trans-Alaska Pipeline Rate Cases*, 436 U.S. 631, 638-39 n.17 (holding that the courts have jurisdiction to hear challenges that the ICC exceeded its statutory authority in issuing orders even though they are precluded from challenging the reasonableness of rates).

[88] *See* cases cited *supra* note 83. The Supreme Court also tends to find that

Neither the language of Section 526(a)(1) nor its legislative history present clear and convincing evidence that Congress intended the sixty-day time restriction on judicial review to apply to challenges of jurisdictional regulations such as 30 C.F.R. § 842.12(a)(2) or to govern challenges based on constitutional grounds.[89] Without convincing proof of such congressional intent, judicial review should be available.[90] Nevertheless, a broad reading of Section 526(a)(1) is possible, and courts are likely to disagree on the scope issue.[91] The Secretary's broad interpretation of the section is entitled to significant deference.[92] Therefore, the constitutional implications of such a broad reading must be examined.

III. DUE PROCESS CONCERNS

Even though Congress has the power to limit the jurisdiction of the lower federal courts,[93] it seems grossly unfair to forbid a party failing to meet the sixty-day period from challenging a regulation in some situations.[94] Although the APA offers no

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statutory review restrictions do not preclude constitutionally based challenges. Califano v. Sanders, 430 U.S. 99, 109 (1977) (The Court "will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction [of constitutional issues] unless Congress' intent to do so is manifested by 'clear and convincing' evidence."). *See also* Ralpho v. Bell, 569 F.2d 607, 621-22 (D.C. Cir. 1977) (find that constitutional challenges to Commission settlements under the Micronesian Claims Act of 1971 were not barred by provision stating that such settlements were final and conclusive and not subject to review).

[89] *See supra* notes 62-82 and accompanying text.

[90] *See* cases cited *supra* notes 57-60 and accompanying text.

[91] *See* cases cited *supra* note 54.

[92] Environmental Protection Agency v. National Crushed Stone Assn., 449 U.S. 64, 83 (1980).

[93] *See supra* note 3 and accompanying text.

[94] Justice Powell recognized the potential unfairness of quick-fused statutes of limitations on reviewing agency actions in his concurring opinion in Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) where he wrote:

> The 30-day limitation on judicial review imposed by the Clean Air Act would afford precariously little time for many affected persons even if some adequate method of notice were afforded. It also is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register. . . .

Id. at 290 (Powell, J., concurring).

procedural protection to a challenger barred by statute,[95] the fifth amendment's due process clause may require that a party be afforded an opportunity to seek court review.[96] Judicial review should be available to assess a party's due process contentions despite the expiration of the statutory period.[97]

Due process concerns with Section 526(a)(1) arise in several situations. Such concerns most frequently surface when the party seeking to challenge a regulation had no previous opportunity[98] or reason[99] to bring suit during the statutory review period. Due process issues are not as significant in pre-enforcement rulemaking challenges as they are in adjudications[100] because rulemakings are based on legislative policy[101] decisions that generally apply to many individuals.[102] The APA's notice and comment

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[95] The APA expressly acknowledges that Congress may completely preclude judicial review. 5 U.S.C. § 701(1) (1982).

[96] As Justice Brandeis has stated:

> If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies. . . . [I]t is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.

Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting). *See also* Londoner v. Denver, 210 U.S. 373, 385 (1908) (stating that in some circumstances due process requires that an individual be given an opportunity to challenge an ordinance). *Cf.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 542 (1978) (Under some exceptional circumstances, due process may mandate that an individual be afforded more procedural protection in an informal rulemaking proceeding than is provided under the APA.).

[97] *See* cases cited *supra* notes 43-46 and accompanying text.

[98] *See supra* notes 24-26 and accompanying text.

[99] *See supra* notes 27-32 and accompanying text.

[100] Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). *See also* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 (1958) (Agencies are often the "masters of legislative facts" and such facts do not concern the personal activities of businesses or individuals which are often disputed in adjudications.).

[101] The vast majority of regulations promulgated under SMCRA are aimed at coal operators in general and mining methods in particular geographic regions. OSM regulations are not aimed at selected operations on an individual basis. McGraw Interview, *supra* note 20.

[102] *Bi-Metallic Inv. Co.*, 239 U.S. at 445 ("Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. . . . There must be a limit to individual argument in such matters if government is to go on.") (distinguishing Londoner v. Denver, 210 U.S. 373 (1980) because of the relatively small number of persons affected by the tax assessment in that due process case). *See also* K. DAVIS, *supra* note 100, at § 7.02.

provisions[103] and the sixty-day review period under Section 526(a)(1) go a long way toward protecting due process rights even though the affected party may not have been motivated to challenge the regulation when promulgated.[104] Nevertheless, due process concerns are heightened when the party seeking review of the regulation is the defendant in an enforcement proceeding who did not have proper prior opportunity to challenge the adverse rule.[105] This is especially true where the challenge is based on constitutional grounds.[106] Even in this setting, however, it is likely that someone has thoroughly tested the regulation in question during the statutory review period.[107]

In *Yakus v. United States*,[108] the issue was presented whether invoking a sixty-day time restriction on judicial review of regulations adopted under the Emergency Price Control Act[109] deprived petitioners of due process. The statutory review period had expired, and the district court barred petitioners from challenging the validity of the regulation in an enforcement proceeding.[110] On appeal, the claimants argued that their due process rights were violated because the sixty-day limit on review was inadequate for filing a protest.[111] In a decision from which three Justices dissented, the Court held that, under the circumstances

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[103] 5 U.S.C. § 553 (1977).

[104] Professor Verkuil argues that the APA's notice and comment procedures are more than sufficient to protect a party's due process rights even though the party had no notice or opportunity to participate in the rulemaking. Individual procedural rights are not compatible with the legislative process, but individuals are still protected via the general participation of those interested parties who are involved in the proceedings. Verkuil, *supra* note 61, at 756 n.88.

[105] *Cf. Londoner*, 210 U.S. at 385 (1908) (holding that individuals assessed with tax for paving street via a city ordinance have right to be heard and present proof). *See also supra* note 94 and *infra* text accompanying notes 164-168.

[106] *Adamo Wrecking Co.*, 434 U.S. at 289-90 (Powell, J., concurring). *See also infra* notes 118-122 and accompanying text.

[107] Verkuil, *supra* note 61, at 757 n.93.

[108] 321 U.S. 414 (1944).

[109] Emergency Price Control Act of 1942, § 204(d), 56 Stat. 23 (repealed 1947).

[110] The petitioners raised the question specifically reserved in Lockerty v. Phillips, 319 U.S. 182 (1943): whether the validity of a regulation can be challenged in an enforcement proceeding although it had not been tested by petitioners during the statutory review period. Yakus v. United States, 321 U.S. 414, 419 (1944).

[111] *Yakus*, 321 U.S. at 431.

of the case, the statute was capable of protecting the petitioner's rights.[112] The Court qualified its holding by stating that:

> only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process *to petitioners* could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed.[113]

Yakus establishes that the right to challenge the validity of a regulation may be forfeited by failing to file the claim within the period mandated by statute.[114] The Court indicated, however, that statutory restrictions on the availability of judicial review may not be constitutionally applied in all instances.[115] First, although a sixty-day limit appears to be procedurally sufficient on its face, a lesser period may at some point become inadequate.[116] Second, the Court hinted that due process may be violated if the claimant can show a legal excuse as to why it had no opportunity to challenge during the statutory review period.[117] The majority opinion in *Yakus* declined to rule on the question of whether the constitutionality of the regulation could be raised in a criminal enforcement proceeding after the sixty—day period has run.[118] Modern courts have also avoided this last issue.[119]

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[112] *Id.* at 435 (The sixty-day period allowed for protest "cannot be said to be unreasonably short in view of the urgency and exigencies of wartime price regulation.").

[113] *Id.* (emphasis added). The Court further noted that "[n]o reason is advanced why petitioners could not, throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure. . . ." *Id.* at 437.

[114] *See id.* at 435.

[115] *Id.*

[116] The Court examined the length of the period as balanced against the legitimate concerns of Congress and concluded that "the authorized procedure is not incapable of affording the protection to petitioners' rights required by due process." *Id.*

[117] *See supra* note 137. At least it seems that the Court would balance any legal excuse as to why an earlier challenge could not be made against the legislative and public interests advanced by the judicial review restriction. *See Yakus*, 321 U.S. at 437. Upon its promulgation, the regulation immediately affected the petitioners in *Yakus*; and thus, they had reason and opportunity to challenge the regulations within the sixty-day period. Contrast these conditions to the scenarios developed *supra* notes 24-32 and accompanying text. *See also infra* notes 164-68 and accompanying text.

[118] The Court stated: "[w]e have no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face." *Yakus*, 321 U.S. at 446-47.

[119] *Cf.* Califano v. Sanders, 430 U.S. 99, 109 (1977); Johnson v. Robinson, 415 U.S. 361, 366-67 (1974) (construing statute not to preclude review of constitutional challenges to regulations).

Possibly, the basis of the regulatory challenge bears on the degree of judicial review opportunity that must be afforded.[120]

Yakus seems to support the constitutionality of applying the Section 526(a)(1) sixty-day bar against any individual who was under potential threat of injury or impact from a particular regulation at the time of its adoption.[121] *Yakus* can, however, be read to leave the due process issue open as to individuals who had no real opportunity to challenge the regulation during the sixty-day period.[122] This possibility has been addressed in other cases by members of the Court[123] and by lower federal courts.[124]

Another factor in this analysis is the type of interest the petitioner has at stake in the proceedings.[125] In *Bowles v. Willingham*,[126] the Court reinforced its *Yakus*[127] holding that Congress could restrict judicial review of agency regulations where the review period provided is adequate.[128] Justice Rutledge concurred in the decision but explained that:

> [d]ifferent considerations, in part, determine this question from those controlling when enforcement is by criminal sanc-

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[120] *Yakus*, 321 U.S. at 446-47. *See* cases cited *supra* note 119.

[121] *Yakus*, 321 U.S. at 434-37.

[122] *Id. See infra* notes 164-68 for discussion of what is proper "opportunity."

[123] *Adamo Wrecking Co.*, 434 U.S. at 290 (Powell, J., concurring) (noting that the thirty-day limitation on judicial review under the Clean Air Act "would afford precariously little time for many affected persons even if some adequate method of notice were afforded"); Bowles v. Willingham, 321 U.S. 503, 526 (1944) (Rutledge, J., concurring) (Congress can restrict review of regulations that affect economic interests as long as "the previous opportunity [is] adequate for the purpose prescribed, in the constitutional sense.").

[124] Holmes Limestone Co. v. Andrus, 655 F.2d 732, 738 (6th Cir. 1981) (questioning the propriety of enforcing a sixty-day review limitation against an operator who had no knowledge of the adoption of the regulations); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (stating that despite Congress' power to restrict the jurisdiction of the lower federal courts, it cannot exercise that power to deprive any person of property without due process of law).

[125] *See Bowles*, 321 U.S. at 525 (criminal sanctions more compelling than economic impact) (Rutledge, J., concurring). *Cf.* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (stating that due process was flexible and one factor to be considered in the analysis was the private interest that was affected by the government action).

[126] 321 U.S. 503 (1944).

[127] *Yakus*, 321 U.S. at 434-37.

[128] *Bowles*, 321 U.S. at 520 (whether due process required provisions for hearings prior to the Administrator's settling of rent rates through orders or regulations).

> tion. . . . Since in these cases the rights involved are rights of property, not of personal liberty or life as in criminal proceedings, the consquences, though serious, are not of the same moment under our system, as appears from the fact they are not secured by the same procedural protections in trial. It is in this respect perhaps that our basic law, following the common law, most clearly places the rights to life and to liberty above those of property.[129]

When a regulation's validity is attacked as a defense in an enforcement action, preclusion of the challenge as untimely seems contrary to due process rights.[130] Under SMCRA, the defendant in an enforcement proceeding may be facing a substantial civil penalty,[131] revocation of its surface mining permit,[132] or imprisonment.[133] In this situation, a defendant has a "property"[134] or "liberty"[135] interest at stake, yet is not given hearing rights on "all" issues if the sixty-day review period has expired.[136] The reviewing court is apparently barred from hearing challenges to the underlying regulation's validity.[137]

When the interests at stake are protected by the fifth or fourteenth amendments,[138] court review should be available to ascertain whether the individual was afforded sufficient due process before[139] being deprived of these inter-

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[129] *Bowles*, 321 U.S. at 525 (Rutledge, J., concurring).

[130] *See* BATOR, *supra* note 47, at 336-38.

[131] SMCRA § 518(a)-(g), 30 U.S.C. § 1268(a)-(g) (1982).

[132] SMCRA § 521(a), 30 U.S.C. § 1271(a) (1982).

[133] SMCRA § 518(e), (f), (g), 30 U.S.C. § 1268(e), (f), (g) (1982).

[134] Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571-72 (1972) ("property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money"). Clearly, both the imposition of fines and revocation of a mining license impinge on protected property interests. *Id.*

[135] Freedom from bodily restraint is the most fundamental of the liberty interests protected by the due process clause. *Id.* at 572.

[136] Although hearing rights are afforded under SMCRA § 526(a)(2), the sixty-day preclusion of Section 526(a)(1) will bar an untimely challenge to the validity of the underlying regulation. 30 U.S.C. § 1276(a)(1), (2) (1986); Clinchfield Coal Co. v. Hodel, No. 85-2206 (4th Cir. Aug. 27, 1986); Drummond Coal Co. v. Watt, 735 F.2d 469, 472-76 (11th Cir. 1984).

[137] *See* cases cited *supra* note 136.

[138] U.S. CONST. amend. V & XIV.

[139] Post-deprivation procedures are sometimes adequate to protect one's due process rights, especially in light of important governmental interests. *Bowles*, 321 U.S. at 520-

ests.[140] Congress can decide whether or not to create a property right in a particular area, but the courts must rule on the procedures Congress establishes to revoke these rights.[141]

Traditionally, courts apply the *Mathews v. Eldridge*[142] balancing test to determine if the procedures provided by statute for revoking a right are constitutionally adequate.[143] This balancing illustrates that due process hearing rights are not absolute,[144] and that the procedural protection due is based on the interests at stake.[145] The *Mathews* test is most frequently used

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21 (finding that opportunity to challenge rent fixing order after its effective date is sufficient); Phillips v. Comm'r of Internal Revenue, 283 U.S. 589, 596-97 (1931) ("Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."). *See also* Ingraham v. Wright, 430 U.S. 651, 678 (1977) (holding that common law civil sanctions afford sufficient protection to students against "unjustified corporal punishment" by school officials).

The due process concern under SMCRA § 526(a)(1) is not the *timing* of the hearing in relation to the deprivation, but the *scope* of what can be challenged at the hearing. As Justice Marshall has recognized, "due process requires that a hearing be held 'at a meaningful time and in a meaningful manner.' " Arnett v. Kennedy, 416 U.S. 134, 212 (1974) (Marshall, J., dissenting) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

[140] Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 540-41 (1985). In *Loudermill*, the Court firmly rejected the contention that the Legislature could define the procedures for depriving an individual of an entitlement which it created by statute. *Id.* Once it is established that a property right exists, the court's role is to determine "what process is due." *Id.* at 541. *See also Arnett*, 416 U.S. at 167 (Powell, J., concurring in part) (Six Justices rejected the "bitter with the sweet" approach advocated by Justice Rehnquist.).

[141] *Loudermill*, 470 U.S. at 540-41.

[142] 424 U.S. 319, 335 (1976).

[143] *Loudermill*, 470 U.S. at 543 (reciting the three factors in the *Mathews* test). In *Mathews*, the Court established the following three prong test to determine what process is due.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S at 335.

[144] *Mathews*, 424 U.S. at 335.

[145] At least where property interests are at stake, courts apply the *Mathews* balancing test to determine what procedural protection should be provided for "the generality of cases" of that type, "not the rare exceptions." *Id.* at 344. This wholesale approach may not be appropriate when fundamental liberty interests are at stake. *See* Lassiter v. Department of Social Sec. Servs. of Durham County, 452 U.S 18, 31-32 (1981) (child custody rights at stake); *see also* Vitek v. Jones, 445 U.S. 480, 495 (1980) (prisoners facing involuntary transfer to a mental hospital).

to determine what *type* of procedural safeguards are required to insure a sufficiently accurate decision before depriving a party of a protected interest.[146] These same factors can also be applicable to ascertain whether the *scope*[147] of the hearing provided sufficiently protects one's due process rights.[148] In fact, the *Mathews* test considerations are very similar to factors advanced by Justice Rutledge in his *Bowles v. Willingham*[149] concurrence for evaluating due process concerns when Congress has restricted the availability of judicial review.[150] The same types of factors[151] could be considered by the courts in determining whether the scope of review provided under SMCRA is adequate[152] under the circumstances of the case.[153]

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[146] *See generally* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 30 (1976).

[147] In an enforcement proceeding, the court will hear all of the defendant's defenses except those based on a challenge to the underlying regulation's validity. Although the "type" of procedural safeguard is clearly sufficient (i.e., an appeal to U.S. District Court following an administrative hearing), the scope of the appeal may be inadequate to protect the defendant's due process rights.

[148] *See* Note, *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, 97 HARV. L. REV. 778, 788-89 (1984). In both scenarios, Congress has established the procedures to be used to revoke a property right and the courts' role is to determine whether the procedural system established is sufficient in a due process sense. *Loudermill*, 470 U.S. at 540-41.

[149] 321 U.S. 503.

[150] *Id.* at 526. Justice Rutledge reasoned that Congress can restrict judicial review of the validity of a regulation in a civil enforcement action subject to the following limitations:

> (1) The order or regulation must not be invalid on its face; (2) the previous opportunity must be adequate for the purpose prescribed, in the constitutional sense; and (3) . . . the circumstances and nature of the substantive problem dealt with by the legislation must be such that they justify both the creation of the special remedy and the requirement that it be followed to the exclusion of others normally available.

Id. (Rutledge, J., concurring).

[151] *See supra* note 143.

[152] If the enforcement court is barred by statute from entertaining challenges to the validity of a regulation, the due process question is whether the prior judicial review period (e.g., sixty days) provided the defendant with sufficient notice and opportunity to be heard under the circumstances. *See Yakus*, 321 U.S. at 434-37; *see also supra* notes 111-17 and accompanying text.

[153] This type of analysis should not be subject to a "wholesale" balancing approach because the risk of erroneous deprivation under the procedural framework is not in issue. Rather, the due process claim is based on one's opportunity to be heard which

The first factor considered in the *Mathews* test is the type of "interest that will be affected by the official action."[154] The threat of civil penalties is not as compelling an interest to be protected as is revocation of a permit[155] or criminal sanctions.[156] If the defendant in an enforcement hearing under SMCRA faces criminal liabilty, the court should be more concerned about the defendant's prior opportunity to challenge the regulation's validity during the sixty-day review period.[157]

The second factor, "risk of erroneous deprivation"[158] exists if a party is precluded from challenging the validity of a regulation where it appears that the regulation in question is flawed.[159] If a court had previously reviewed the regulation in a challenge brought by another party and rejected the claim on the merits, the risk of erronerous deprivation is slight.[160] Where a regulation goes through the review period unchallenged, however, the risk could be high.[161]

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can be very case specific. *See supra* notes 24-33 and accompanying text. A case-by-case analysis of the *Mathews* factors is appropriate where "it is neither possible nor prudent" to attempt to formulate adequate procedures by a wholesale approach to be used in every instance because "the facts and circumstances are susceptible of almost infinite variation." *Lassiter*, 452 U.S. at 32 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)).

[154] *Mathews*, 424 U.S. at 335.

[155] SMCRA § 521(b)(4), 30 U.S.C. § 1271(b)(4) (1982). Once an operator has had a permit revoked under SMCRA, it is precluded from ever obtaining another permit at any other site. SMCRA § 510(c), 30 U.S.C. § 1260(c) (1982). Revocation of a permit pursuant to a finding of a willful pattern of violations in an enforcement proceeding can therefore be fatal to a coal mining company.

[156] *See, e.g.*, SMCRA § 518(e), 30 U.S.C. § 1268(e) (1982). As Justice Stephens has noted: "the value of protecting our liberty from deprivation by the State without due process of law is priceless." *Lassiter*, 452 U.S. at 60 (Stephens, J., dissenting).

[157] *But see Yakus*, 321 U.S. at 434-37. *See supra* notes 110-22 and accompanying text.

[158] *Mathews*, 424 U.S at 335. The type of error in question here, however, is not the same as in *Mathews* where the potential error was one of applying fact to law (i.e., was the individual entitled to the benefit). In the context of a statutory restriction on judicial review, the risk of error is that the regulation under which the defendant is being fined or disciplined is unconstitutional or invalid on other grounds.

[159] *See, e.g.*, discussion concerning the validity of 30 C.F.R. § 843.12(a)(2), *supra* notes 37-40.

[160] For example, another party or association that was involved in the rulemaking may have unsuccessfully challenged the rule on the applicable gamut of APA § 706(2) grounds.

[161] *See, e.g.*, discussion concerning 30 C.F.R. § 843.12(a)(2) *supra* note 40. *But cf.* Verkuil, *supra* note 35.

The risk of erroneous deprivation may also depend on the type of claim being raised. Where the claim is aimed at a discretionary act, it is more likely that the agency action will withstand judicial scrutiny.[162] Allowing a first time challenge to a regulation in an enforcement proceeding despite the expiration of the statutory review period will essentially remove all risk of an erroneous deprivation of the claimant's property or liberty rights.

The risk of erroneous deprivation may also be increased when the petitioner had no reasonable opportunity to challenge the regulation during the statutory period.[163] Notice and an opportunity to be heard are essential elements of due process that protect against unfair, arbitrary, and mistaken government action.[164] Merely being engaged in the industry at the time a rule is promulgated should not necessarily establish that a sufficient opportunity to challenge existed. For a person to have had a meaningful opportunity to challenge a rule, that person must have been under a potential threat of being affected by operation of the rule at the time it was promulgated. In this regard, if a person would not meet either the "injury in fact" or "zone of interests" requirements of the traditional standing test,[165] the person did not have any meaningful opportunity to challenge the regulation during the review period. The sufficiency of the prior opportunity to challenge a regulation should be determined by the motivation[166] for doing so that existed at that prior time.[167]

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[162] A challenge aimed at the substance of a regulation is less likely to be successful because of the broad discretion given to an agency in promulgating performance standards. *See supra* note 67. A court will give much less deference to an agency action in deciding whether it exceeded its jurisdictional authority or acted in an unconstitutional manner. *See supra* note 41. In a sense, the distinction is based on a court's traditional role in deciding issues of law de novo while allowing the agency to control on ordinary issues of fact finding, especially concerning facts within the agency's area of expertise. *See* Crowell v. Benson, 285 U.S. 22, 48-49 (1932). The differing levels of scrutiny are reflected in the various review standards of the APA. 5 U.S.C. § 706(2)(A)-(F) (1982).

[163] *See supra* notes 24-32 and accompanying text.

[164] *See* Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972).

[165] *See supra* note 26 and accompanying text.

[166] *See supra* notes 24-32 and accompanying text.

[167] Even though a reason for challenging a regulation may not clearly exist at the time the regulation is promulgated, a business impact may be foreseeable to the extent that a sufficient opportunity is deemed to have existed. For example, an eastern Kentucky

A party's due process interests are certainly at their peak when no prior opportunity to challenge existed because the claimant only came into existence after the review period had lapsed.[168]

The third factor considered in the *Mathews* due process balance is "the [g]overnment's interest including . . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[169] The government's interests in restricting the review of national performance standards is significant.[170] It is essential to the efficient and uniform enforcement of the regulatory program of SMCRA that performance standards be established with finality.[171] The same strong interests do not apply to jurisdictional regulations,[172] or regulations aimed at a few individuals.[173] The administrative burden on the agency and courts would be significant if the validity of the underlying regulation could be challenged in every enforcement proceeding. If, however, review is afforded only when the due process factors weigh heavily in favor of allowing the defendant's challenge,[174] the administrative and fiscal burden would not be consequential.[175]

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coal operator may not participate in rulemakings concerning prime farmland or mining in alluvial valley floors because no properties on which it operates contains either of these features. Yet, it is much more foreseeable that the company will be impacted by prime farmland regulations in the future since these soil types exist in eastern Kentucky whereas alluvial valleys are located primarily in the western United States. *See also* examples cited *supra* notes 28-29 and accompanying text.

[168] *See supra* note 24 and accompanying text.

[169] *Mathews*, 424 U.S. at 335.

[170] *See supra* notes 18-23 and accompanying text.

[171] *See supra* note 80.

[172] *See supra* note 81.

[173] When a controversial rule is aimed at a few individuals and involves adjudicative type facts concerning the person's activities, business, or property, the government's interest may be overshadowed by the individual's due process rights. *See, e.g.*, *Londoner*, 210 U.S. at 385 (tax assessment against a few individuals). *Cf.* Southern R.R. Co. v. Virginia, 290 U.S. 190, 198-99 (1933) (finding that an administrative officer cannot be granted authority to eliminate defendant's railroad grade crossing under a statute unless the defendant had opportunity to challenge the officer's findings in a hearing). However, if the rule is based on general policy decisions and is to be applied to the public, then an individual's potential contribution to the fashioning of the rule is less important. *See supra* notes 100-04 and accompanying text.

[174] *See supra* note 143.

[175] This is especially true since the burden of establishing that the balancing factors favor review of the challenged regulation is placed on the claimant. *See Yakus*, 321 U.S. at 437.

This balancing approach as applied to an enforcement proceeding challenge of the validity of a regulation such as 30 C.F.R. § 843.12(a)(2),[176] should support a claimant's due process right to be heard despite a statutory time bar when the following circumstances exist:

> (1) the defendant faces a severe penalty such as revocation of a mining permit or criminal sanctions;
> (2) the defendant was not in the mining industry at the time the regulation was adopted or had no real business justifications (impact threat) for challenging the regulations at that time;
> (3) the regulation was not challenged previously by another party on the same grounds;[177]
> (4) the regulation is not a substantive performance standard;
> (5) the grounds of the challenge are well suited for judicial review such as constitutionality or lack of statutory authority; and
> (6) a cursory review of the regulation indicates that the challenge has merit.

The presence of all these factors would create the strongest due process argument for not applying the sixty-day bar of Section 526(a)(1). Possibly, a court could find due process implicated with less.[178] This conclusion is not inconsistent with the holding in *Yakus*.[179] The defendants in *Yakus* were subject to criminal sanctions but were also directly and adversely impacted by the price regulations from the day they became effective.[180]

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[176] For the text of the regulation see *supra* note 38. The claim raised by the defendant would be that OSM does not have authority to issue Notices of Violations in a state with primacy because the regulation unlawfully extends OSM's enforcement authority beyond the statutory limits established under the Act. *See supra* notes 38-40 and accompanying text.

[177] 30 C.F.R. § 843.12(a)(2) (1982) appears to have made it through the sixty-day window for review without being challenged on ultra vires grounds.

[178] *Cf.* Holmes Limestone v. Andrus, 655 F.2d 732, 738 (6th Cir. 1981) (allowing judicial review of the regulation where the small mine operator had no knowledge of the regulation's promulgation). Note that courts have tended to avoid the constitutional issues in construing statutory restrictions on review, but the courts eventually will be faced with a due process claim by a defendant with more compelling circumstances than existed in *Yakus*. *Yakus*, 321 U.S. at 434-37.

[179] *Yakus*, 321 U.S. at 434-37.

[180] *Id.* at 434.

Also, the petitioner's challenge of the underlying price regulation was not based on jurisdictional or constitutional grounds.[181] The Court was careful in its *Yakus* opinion to note that due process may be violated by the application of a statutory review restriction when the circumstances establish that the prior opportunity was inadequate.[182] The balancing factors outlined in *Mathews* can be used to ascertain when the due process threshold has been crossed.[183] The state of the lower courts on this issue illustrates that some type of guidance is needed.[184] As *Yakus* establishes, due process will only be violated by a statutory limitation on rulemaking review under the most compelling circumstances.[185]

IV. SEPARATION OF POWERS CONCERNS

When the party challenging the validity of a rulemaking under SMCRA is a defendant in an enforcement proceeding, the principle of separation of powers[186] may prevent Congress from restricting a court's jurisdiction to hear claims based on constitutional or jurisdictional grounds.[187] In this situation, Congress has not totally removed all jurisdiction from the court as it can

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[181] The petitioners in *Yakus* apparently claimed that the Administrator in fixing the maximum meat prices did not comply with the requirement that established prices be "fair and equitable and effectuate the purposes of the Act." *Id.* at 419-20. The Court explicitly noted that it was not deciding whether a party could "defend on the ground that the regulation [was] unconstitutional on its face." *Id.* at 446-47.

[182] *Id.* at 434. *See also* Ortwein v. Schwab, 410 U.S. 656, 665 (1973) (Marshall, J., dissenting) (noting that there are limits to how far an agency action can be shielded from judicial review).

[183] *Mathews*, 434 U.S. at 335. Factors listed *supra* note 143.

[184] *Compare Holmes Limestone*, 655 F.2d at 738 (review of the regulation allowed) *with* Drummond Coal Co. v. Watt, 735 F.2d 469, 472-76 (11th Cir. 1984) (no review allowed) *and Clinchfield Coal Co.*, 802 F.2d at 103 (review precluded by § 526(a)(1)).

[185] *Yakus*, 321 U.S. at 434-37. *See also Ortwein*, 410 U.S. at 658-60 (requiring indigents to pay a $25 filing fee for appeal of agency action depriving them of welfare entitlements does not deny due process).

[186] "As an inseparable element of the constitutional system of checks and balances, and as a guarantee of the judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch." Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 58 (1982).

[187] *Cf. Northern Pipeline Constr. Co.*, 458 U.S. at 58-87; Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 106 S. Ct. 3181 (1986). *See generally* BATOR, *supra* note 47, at 336-44.

do under Article III.[188] Instead, the statutory preclusion from hearing claims as to a regulation's validity impacts on the "way" the court must decide the case.[189] Congressional limitations on the manner in which a court can act implicate separation of powers conflicts because Congress is in effect deciding part of the case itself.[190] When the intrusion is so serious that Congress in effect removes essential attributes of judicial power from the courts, then the statutory restriction cannot stand.[191] In this situation, the Court, and not Congress, has the final say as to whether a statutory provision improperly encroaches on the power reserved to a particular branch.[192]

At least one case holds that Congress violates separation of powers constraints when it tells a court how it must decide a case.[193] In *United States v. Klein*,[194] the Supreme Court found a congressional attempt to alter rules of evidence previously established by the Court to be unconstitutional.[195] By precluding the Court from giving "the effect to evidence which, in its own judgment, such evidence should have . . . Congress inadvertently passed the limit which separates the legislative from the judicial power."[196] In *Klein*, Congress attempted to remove certain issues from the Court's consideration while leaving them with jurisdiction to otherwise decide the case.[197]

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[188] In an enforcement hearing under SMCRA, the district court which had jurisdiction to enforce the Secretary's findings is precluded from hearing claims as to the validity of regulation by § 526(a)(1) if the sixty-day review period has expired. 30 U.S.C. § 1276(a)(1) (1982). *See also supra* note 3.

[189] *See* BATOR, *supra* note 47, at 336-37.

[190] *Id. See also* United States v. Will, 449 U.S. 200, 217-18 (1980) ("A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.").

[191] *See Chadha*, 462 U.S. at 962; *Northern Pipeline Constr. Co.*, 458 U.S. at 87.

[192] Baker v. Carr, 369 U.S 186, 211 (1962) (The decision is a "delicate exercise in constitutional interpretation.").

[193] United States v. Klein, 80 U. S. (13 Wall.) 128 (1872).

[194] *Id.*

[195] *Id.* at 147-48. The Act in question provided that a Presidential pardon could not be admitted into evidence to show a noncombatant Southerner's proof of loyalty to the union during the Civil War. *Id.* at 143-44. The Act also attempted to remove jurisdiction from the Court to hear the case when the claim was based on a pardon as evidence of loyalty. *Id.*

[196] *Id.* at 147.

[197] *Id.* at 143-44.

The Court in *Yakus*, however, permitted Congress to restrict an enforcement court's jurisdiction to hear challenges to regulations promulgated under the Emergency Price Control Act.[198] The Court's approval of the sixty-day review limitation came despite the strong separation of powers warnings in Justice Rutledge's dissent.

> It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so. This Congress cannot do. There are limits to the judicial power. Congress may impose others. And, in some matters Congress or the President has final say under the Constitution. But whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it.[199]

Somewhere between *Klein* and *Yakus* Congress encroaches on the judicial power of the courts.[200] A key distinction between the cases is that in *Yakus* Congress did provide some opportunity for judicial review via the sixty-day period.[201] Also, *Klein* involved a direct mandate as to how to rule on an issue of law.[202] In *Yakus*, Congress only acted to remove certain claims from consideration.[203] Third, in *Klein* Congress infringed on an area

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[198] 321 U.S. 414, 434-37 (1944). For full discussion of case see *supra* notes 108-18 and accompanying text.

[199] *Yakus*, 321 U.S. at 468 (Rutledge, J., dissenting).

[200] In *Yakus*, the majority upheld the sixty-day statutory restriction on challenging regulations under the EPCA even though the claim was raised in a criminal enforcement proceeding. *Id.* at 446-47.

[201] *Yakus*, 321 U.S. at 428 (review was in the Emergency Court of Appeals).

[202] *Klein*, 80 U.S. (13 Wall.) at 147 (The Act required the Court to give the evidence "an effect precisely contrary" to that which the Supreme Court had previously given it.).

[203] *Yakus*, 321 U.S. at 431 (The Act barred the courts from hearing challenges of the regulation's validity during an enforcement prosecution; however, this effectively affirms the regulation's validity.).

with constitutional underpinnings because it affected the power of the Executive to issue pardons.[204] The majority in *Yakus* explicitly noted that claims concerning the regulation's constitutionality were not at issue.[205] Finally, the legislative restrictions in *Klein* were motivated by a desire to control the outcome of particular cases and were not based on any legitimate objectives.[206]

Examination of recent separation of powers cases indicates the degree to which the current Court is willing to let Congress restrict the scope of review of enforcement courts.[207] The distinctions between *Klein* and *Yakus*[208] provide the framework for approaching this problem: (1) what types of claims can Congress remove from the courts completely; and (2) if some types of challenges cannot otherwise be totally precluded from judicial review, whether a limited pre-enforcement review period protects against a separation of powers violation.

A. Types of Challenges Sought to be Precluded

The "public rights" doctrine recognizes that Congress is free to commit some matters exclusively to a legislative court or an administrative agency for determination without impacting on separation of powers concerns.[209] Public rights include those " 'matters arising' between the [g]overnment and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative depart-

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[204] *Klein*, 80 U.S. (13 Wall.) at 147-48.

[205] *Yakus*, 321 U.S. at 437-38. *See supra* note 181.

[206] *Klein*, 80 U.S. (13 Wall.) at 145 (The controlling purpose of Congress was to "deny . . . pardons granted by the President the effect which this [C]ourt had adjudged them to have."). *See also* Sager, *Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 77 (1981).

[207] The branches are not hermetically sealed from one another and some overlap of powers takes place that is not constitutionally forbidden. Buckley v. Valeo, 424 U.S. 1, 121 (1976).

[208] *See supra* notes 201-06. The key distinctions concern: the type of issues removed from the court, the manner in which they are removed (immediately or after sixty days), and the congressional motives for the restrictions.

[209] *Northern Pipeline Constr. Co.*, 458 U.S. at 67-68; *Ex Parte* Bakelite Corp., 279 U.S. 438, 452 (1929); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855).

ments."[210] This doctrine is limited to those matters that are traditionally functions of those departments[211] and does not extend to "*any* matter which, *from its nature*, is the subject of a suit at the common law, or in equity, or admiralty."[212]

The public rights doctrine supports the ability of Congress to preclude judicial review of a regulation's validity under Section 526(a)(1) of SMCRA when the grounds for the challenge relate to a matter of agency discretion in formulating substantive regulations.[213] The substance of rules regulating surface mining activities undoubtedly is traditionally controlled by the legislative branch. When Congress is dealing with an area of statutory origin,[214] "it clearly has the discretion, in defining [those] right[s] to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate [those] right[s] must do so before particularized tribunals created to perform the specialized adjudicative tasks related to [those] right[s]."[215]

When, however, an act of Congress[216] impacts on a private right which can otherwise be protected by a suit at common law,[217] separation of powers mandates that some

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[210] *Northern Pipeline Constr. Co.*, 458 U.S. at 67-68 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).

[211] *Ex Parte Bakelite Corp.*, 279 U.S. at 458; *Northern Pipeline Constr. Co.*, 458 U.S. at 69 n.23 (The presence of the United States as a party "is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.' ").

[212] *Northern Pipeline Constr. Co.*, 458 U.S. at 69 n.23 (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 284) (emphasis in *Northern Pipeline Constr. Co.*).

[213] Typically, these would include a claim that the regulation was arbitrary or capricious. *See supra* note 162. Yakus v. United States, 321 U.S. 414 (1944), involved a regulatory challenge of this type. *See supra* note 181. *Cf.* Briscoe v. Bell, 432 U.S. 404, 412 (1977) (finding that factual determinations by the Director that a state meeting the requirements of § 4(b) of the Voting Rights Act was barred from judicial review); Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n., 430 U.S. 442, 450 (1977).

[214] This area includes creation of substantive rights created in rulemakings pursuant to Congress' broad constitutional powers. *Northern Pipeline Constr. Co.*, 458 U.S. at 83 n.35.

[215] *Id.* at 83. *See also Atlas Roofing Co.*, 430 U.S. at 458 (Administrative fact-finding is valid "where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights.").

[216] Also included are regulations adopted by an agency in its legislative capacity.

[217] In *Murray's Lessee*, 59 U.S. (18 How.) 272, the Court examined the law of England and the United States at the time the Constitution was adopted to ascertain if

degree[218] of judicial review be available to resolve conflicts.[219] Challenges to a regulation based on constitutional grounds must be reviewable at some point by the courts.[220] A concern that remains is whether any other types of challenges to a regulation must be reviewable by an Article III court.[221]

A claim that an agency acted in excess of its statutory authority should also be reviewable by the courts and cannot be subject to a statutory attempt to preclude the question.[222] Just as court review is available to insure that Congress has not overstepped its constitutional limits,[223] judicial review must be available to determine if an agency has acted beyond its statutory limits.[224] When a statute attempts to preclude ultra vires chal-

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the right was recognized as actionable at common law. *Id.* at 280-82. *See also Atlas Roofing Co.*, 430 U.S. at 449 (construing suits at common law).

[218] *Northern Pipeline Constr. Co.*, 458 U.S. at 115 (White, J., dissenting) (suggesting that "the presence of appellate review by an Art. III court will go a long way toward insuring a proper separation of powers"); Kalaris v. Donovan, 697 F.2d 376, 386 (D.C. Cir. 1983) (certain "private" state law claims must be heard by Article III courts).

[219] *Northern Pipeline Constr. Co.*, 458 U.S. at 87, 91, 115. The plurality (Justices Brennan, Marshall, Blackmun, and Stephens), concurrence (Justices Rehnquist and O'Connor), and the dissent (Chief Justice Burger and Justices White and Powell) all seem to agree that where constitutional claims are at stake, Article III precludes Congress from removing the question entirely from the courts. The concurrence disagreed with the plurality's view of the public/private right distinction because the plurality placed more emphasis on Congressionally created rights than did *Crowell*. The dissenters acknowledged that the bankruptcy courts were granted power to hear some traditionally private claims but believed the appellate review available in the Article III courts was sufficient to prevent separation of powers violation.

[220] *Id. See generally* Sager, *supra* note 206, at 76-77. Recall that the issue Congress precluded in *Klein* had constitutional underpinnings because Congress was prescribing law as to the effect of a Presidential pardon under Article II. United States v. Klein, 80 U.S. (13 Wall.) at 147-48.

[221] For example, under the APA a regulation can be challenged on other legal grounds besides constitutionality. 5 U.S.C. § 706(2)(A), (C), (D)-(F) (1982). *See supra* note 54.

[222] Owens v. Hill, 450 F. Supp. 218 (N.D. Ill. 1978) ("The separation of powers and delegation concepts mandate review even in the face of the preclusion statute to insure that an agency has not violated its statutory authority."). *See also* Note, *supra* note 148, at 786-87. Note that the "otherwise inconsistent with law" standard may also be a ground that cannot be totally removed from judicial review. 5 U.S.C. § 706(2)(A) (1982).

[223] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

[224] "[E]xecutive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review. . . ." Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 953 n.16 (1983). *See also supra* note 42.

lenges to agency action, constitutional underpinnings are involved. The reason an agency can legislate in the first instance is because its grant of authority was within the constitutional limits of the nondelegation doctrine.[225] If the nondelegation doctrine is to have any significance, court review must be available at some stage to insure an agency is acting within its statutory framework.[226] An agency cannot have the final say in defining the limits of its delegated powers. Allowing Congress to oust the courts of jurisdiction to hear claims that an agency acted beyond its jurisdictional limits "would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system. . . ."[227]

B. Effect of Limited Court Review

Congress cannot totally preclude courts from hearing challenges of regulations based on constitutional or jurisdictional grounds.[228] The question still remains as to the extent to which Congress can limit court review of these issues. When Congress attempts to limit the jurisdiction of an enforcement court to hear constitutionally based claims,[229] it is impacting on an area traditionally left to the courts.[230] The boundaries between the branches, however, are not clearly defined and some interplay and overlap necessarily occurs without creating separation of powers problems.[231] The separation of powers issue is whether

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[225] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935) (finding the National Industrial Recovery Act unconstitutional because the legislative delegation was too broad and without standards for guidance).

[226] *See supra* notes 42 and 222.

[227] Crowell v. Benson, 285 U.S. 22, 57 (1932) (construing the statute so as to not remove jurisdictional fact questions from Article III courts).

[228] *See supra* notes 216-27 and accompanying text.

[229] In this context, a "constitutionally based claim" includes claims that an agency acted in excess of its statutory authority in promulgating a rule. *See supra* notes 224-25 and accompanying text.

[230] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)("It is emphatically the province and duty of the judicial department to say what the law is.").

[231] "In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." United States v. Nixon, 418 U.S. 683, 707 (1974). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (The Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

Congress has crossed the boundary to the point that it has impermissibly "impaired or sought to assume a power central to another branch. . ."[232] by so restricting the courts' jurisdiction.[233]

The character of congressional action in limiting the scope of a court's review is indicative of whether Congress has impermissibly assumed a judicial branch power.[234] For an unconstitutional assumption of power to exist, the time limiting statute must be essentially judicial in purpose and effect.[235] The nature of a branch's action is "confirmed by the character of the . . . action it surplants."[236] A statutory review limitation not only removes an issue from the courts[237] which they would otherwise have jurisdiction to hear,[238] but it also effectively affirms the validity of the regulation sought to be challenged.[239] In this regard, Congress is substituting its opinion for that of the courts.[240]

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[232] Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 962 (1983) (Powell, J., concurring).

[233] *Id. See also* Buckley v. Valeo, 424 U.S. 1, 129 (1976) ("The Federalist Papers . . . are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.").

[234] *See Chadha*, 462 U.S. at 951-52 (one house legislative veto found to be of a legislative nature); *id.* at 965 n.7 (Powell, J., concurring) ("In determining whether one branch unconstitutionally has assumed a power central to another branch, the traditional characterization of the assumed power as legislative, executive, or judicial may provide some guidance.").

[235] *Id.* at 952, 965. A case or controversy must be at issue before any action can be classified as judicial in nature. *Id.* at 957 n.22. Clearly, a case or controversy in the Article III sense exists when an impacted party seeks to challenge the validity of a regulation, especially if the challenge is raised by the defendant in an enforcement proceeding.

[236] *Chadha*, 462 U.S. at 952.

[237] The issue is removed only after the statutory review period has expired (e.g., sixty days under SMCRA § 526(a)(1)). 30 U.S.C. § 1276(a)(1) (1982).

[238] The courts will generally have jurisdiction to hear challenges of agency rulemakings via the organic statute or the federal question jurisdiction grant in 28 U.S.C. § 1331 (1982). *See* 5 U.S.C. § 703 (1982) (note that the APA does not grant jurisdiction).

[239] Since the court is precluded by statute from hearing the challenge, the validity of the regulation will stand.

[240] Of course, if the controversy involves "public" instead of "private" (e.g., constitutional) rights, Congress can substitute its opinion for that of the court by removing the question entirely. *See supra* notes 209-15 and accompanying text. In the public right instance, Congress generally has legitimate and often compelling objectives in so restricting judicial review. *See supra* notes 18-23 and accompanying text.

Even partial participation[241] of Congress in an inherently judicial area can violate separation of powers.[242] Congressional restriction of constitutionally based challenges to regulations is analogous to the separation of power issue present in *Bowsher v. Synar*.[243] There, the Court held that Congress cannot play a role in the removal of a purely executive officer.[244] Such a reservation of power "would, in practical terms, reserve in Congress control over the execution of the laws."[245] Similarly, where Congress attempts to restrict a court's jurisdiction of constitutionally based claims, it impermissibly prevents a court from performing its ultimate function[246] and assumes a role in the decision of constitutional issues in violation of Article III.[247]

If Section 526(a)(1) of SMCRA is construed to bar constitutional and ultra vires challenges to OSM regulations, a court could readily hold the section unconstitutional on either imper-

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[241] Because the regulation is effectively "affirmed" for all time after the review period has expired, imposing a sixty-day limitation on all types of challenges is like partial participation by Congress in the judicial review process, especially since the court otherwise had jurisdiction to enforce the Secretary's action. *See* BATOR, *supra* note 47, at 336-37.

[242] Myers v. United States, 272 U.S. 52, 161 (1926) (For the legislative branch "to draw to itself . . . the right to participate in the exercise of [another branches power] . . . would be . . . to infringe the constitutional principle of the separation of governmental powers."). *See also* Bowsher v. Synar, 106 S. Ct. 3181, 3188-89 (1986) (holding that Congress cannot hold removal power over purely executive officers).

[243] 106 S. Ct. at 3188-89.

[244] *Id.* However, the Court did point out that Congress has authority to remove executive officers through impeachment. *Id.* at 3188.

[245] *Id.* at 3188. Similar assumptions of power were also condemned by the Court in Nixon v. United States, 418 U.S. 683 (1974), where the majority opinion stated:

> Notwithstanding the deference each branch must accord the others, the 'judicial [p]ower . . . can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.

Nixon, 418 U.S. at 704.

[246] "[T]o say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 176.

[247] *See supra* notes 242-45 and accompanying text. This conclusion suggests that the *Yakus* majority would have agreed with Justice Rutledge's analysis had the regulation been challenged on constitutional grounds—an issue which the majority explicitly avoided. Yakus v. United States, 321 U.S. 414, 446-47 (1944). *Accord* United States v. Klein, 80 U.S. (13 Wall.) 128, 147-48 (1872) (the restriction impacted on the effect the Court could give to a presidential pardon).

missive interference[248] or assumed function grounds.[249] Although Congress can validly restrict or totally preclude claims when private rights are not at stake,[250] an Article III court should be available to hear claims that the agency acted in excess of its statutory authority or in derogation of other constitutional rights.[251]

The availability of judicial review on these issues for sixty days following promulgation of the rule is not sufficient to reserve the "essential attributes of the judicial power . . . in an Article III court."[252] The *Northern Pipeline Const. Co. v. Marathon Pipeline Co.* plurality[253] and concurrence[254] establish that more than limited review of private right claims must be available to avoid invalidation of the statute. Although the dissent in *Northern Pipeline* believes that "the presence of appellate review by an Article III court will go a long way toward insuring a proper separation of powers,"[255] they recognized that the legislative scheme should "accommodate" rather than "substantially undermine" Article III values.[256] Accordingly, these various

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[248] Where the intention of Congress is to preclude constitutional challenges of regulations from review as well as other types of claims, a court should examine the objectives Congress intends to achieve. *See Klein*, 80 U.S. (13 Wall.) at 145; *see also* Sager, *supra* note 206, at 77.

[249] *See supra* notes 234-46 and accompanying text.

[250] *See supra* notes 213-15 and accompanying text.

[251] *See supra* notes 216-27 and accompanying text.

[252] *See Northern Pipeline Constr. Co.*, 458 U.S. at 87.

[253] The suggestion that Article III is satisfied so long as some degree of appellate review is available "is directly contrary to the text of our Constitution. . . . Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law. . . ." *Id.* at 85 n.39 (plurality opinion).

[254] The concurrence found the Bankruptcy Act of 1978 unconstitutional because it *only* provided for traditional appellate review in Article III courts of "traditional actions at common law." *Northern Pipeline Constr. Co.*, 458 U.S. at 90-91. The limited role of the courts is insufficient to prevent violation of Article III where common law rights are in dispute. *Id.* at 91. The concurrence did not join the plurality in its elaboration of the public/private right distinction. *Id.* (Rehnquist, J., and O'Connor, J., concurring).

[255] *Id.* at 115 (Burger, C.J., White, J., and Powell, J., dissenting).

[256] *Id.* The dissent also noted that "the burden on Art. III values should . . . be measured against the values Congress hopes to serve. . . ." *Id.* at 115. This approach is similar to the motive analysis in *Klein*. *Klein*, 80 U.S. (13 Wall.) at 145. *See supra* note 248. Once again, this author questions what legitimate motives of Congress can be served by restricting constitutional review of legislative rules.

views of the Court lead to the conclusion that enforcement courts must always have jurisdiction to hear constitutionally based challenges to legislative rules that are the underlying basis of an administrative order.

CONCLUSION

The sixty-day limitation on judicial review in Section 526(a)(1) of SMCRA fits the mold of similar statutory restrictions in environmental statutes. The sixty-day cutoff on rulemaking review is beneficial to the efficient and effective administration of the surface coal mining regulatory program. The preclusive reach of Section 526(a)(1) has not been definitely established. The sixty-day review limitation clearly cuts off untimely substantive attacks on regulations but also could be interpreted to extend to challenges based on constitutional or ultra vires grounds. When such provisions limiting judicial review are interpreted to encompass all challenges regardless of the basis of the claim or circumstances, due process and separation of powers concerns are raised.

The sixty-day review period goes a long way in protecting a party's due process rights. In some extenuating circumstances due process may mandate that a court review the claimant's regulatory challenge despite the expiration of the sixty-day review period. The government's interest in restricting judicial review is greatest when a petitioner seeks untimely review of the substance of a performance standard; and thus, this type of challenge can readily be barred without violating due process. When, however, a defendant in an enforcement proceeding seeks to attack a regulation on other legal grounds, a balancing of interests may support the claimant's due process right to be heard. The defendant's prior opportunity to challenge the regulation, whether similar claims were previously brought, the degree of threatened injury to the defendant, and the government's interest should all be balanced to determine if due process rights have been violated.

Separation of powers problems are raised when a statutory bar on judicial review is interpreted as extending to challenges of regulations based on constitutional or jurisdictional grounds. Such a congressional restriction impermissibly interferes with an

inherent judicial function. Therefore, Section 526(a)(1) is unconstitutional to the extent that it is construed as barring constitutional or ultra vires challenges of a regulation after the review period has expired. Barring these "private right" claims from judicial review after only sixty days removes essential attributes from the Article III courts that are necessary to maintain the proper balance of powers as mandated by the Constitution.

Jack C. Bender